UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

GOYA FOODS OF FLORIDA

and **CASES 12–CA–23524**
12–CA–25198
12–CA–25286
12–CA–25305

UNITE HERE, CLC

Karen Thornton, Esq., for the General Counsel
Mr. Rodolfo Chavez, for the Charging Party
James C. Crosland, Esq. and David Miller, Esq.,
for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on November 5, 2007 in Miami, Florida. After the parties rested, I recessed the hearing until December 3, 2007 so that counsel had sufficient time to receive and review the transcript and exhibits and to prepare oral argument. On December 3, 2007, I heard oral argument, and, on December 4, 2007, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision. Conclusions of Law, Remedy, Order and Notice provisions are set forth below.

The Unilateral Change Allegations

Paragraph 6(a) of the Order Further Consolidating Cases, Consolidated Complaint and Notice of Hearing (the "Complaint") alleges that on October 6, 2006, the Union requested, by e–mail, that Respondent furnish the Union with the following information for employees in each of the bargaining units: A seniority list, showing name, job title, hire date, pay rate, and amounts and date of last three pay increases, a complete address and phone listing for each employee,

employee handbook and other employment–related policies, and a copy of all employee benefit programs, including medical, life, disability, retirement and other fringe benefits available to employees, including the employer and employee cost for each. Respondent denied these allegations.

Complaint Paragraph 6(b) alleged that the requested information was necessary for, and relevant to, the Union's performance of its duties as the exclusive collective–bargaining representative of the employees in the bargaining units. Respondent denied these allegations.

Complaint Paragraph 6(c) alleges that since October 6, 2006, the Respondent has failed and refused to furnish the Union with the requested information. Although Respondent's Answer did not admit this allegation, during the hearing, Respondent entered into a stipulation which establishes that it never furnished the Union with the information it sought. Based on that stipulation (in evidence as Joint Exh. 1), I find that no supervisor or agent of Respondent provided the information which the Union requested in its October 6, 2006 e–mail. Further, I conclude that the General Counsel has proven the allegations raised by Complaint paragraphs 6(a) and 6(c).

To establish that Respondent's refusal to furnish the information violated Section 8(a)(5) of the Act, the government also must prove that the Union is the exclusive bargaining representative of an appropriate unit of Respondent's employees, and that the requested information is relevant to, and necessary for the Union to represent the employees in that unit. As discussed in the bench decision, the Board held in three previous cases that the Union had not lost its majority status and continued to be the exclusive representative of Respondent's employees in the same two bargaining units described in the present Complaint. Following the principle of *res judicata*, I conclude that the General Counsel has proven that the Union remains the exclusive representative of the bargaining unit employees.

The General Counsel also must prove that the requested information is relevant to the Union's function as exclusive representative, and necessary for that purpose. The information requested by the Union concerns the employees in the two bargaining units it represents, and therefore is presumptively relevant. See *Otay River Constructors*, 351 NLRB No. 69, slip op. at 4 (December 14, 2007), citing *Postal Service*, 332 NLRB 635 (2000). See also *Caldwell Mfg. Co.*, 346 NLRB No. 100 (April 28, 2006); *Certco Food Distribution Center*, 346 NLRB No. 102 (April 28, 2006). No evidence in the record rebuts this presumption. Therefore, I conclude that the General Counsel has proven the allegations raised by Complaint paragraph 6(b).

The record also does not disclose any circumstance which would excuse the Respondent from its duty to provide the requested relevant information to the Union. Accordingly, I conclude that the General Counsel has proven that Respondent's failure and refusal to furnish the Union with the requested information violates Section 8(a)(5) and (1) of the Act, as alleged.

Unilateral Implementation of Savings and 401(k) Plan

For the reasons discussed in the bench decision, I have concluded that Respondent violated Section 8(a)(5) and (1) of the Act by changing the terms and conditions of employment for bargaining unit employees without first notifying the Union and affording it the opportunity

to negotiate regarding the proposed changes. These unlawful unilateral actions include both the changes in health insurance coverage alleged in Complaint paragraph 9 and Respondent's replacing the existing pension plan with a retirement and 401(k) savings plan, as alleged in the various subparagraphs of Complaint paragraph 7.

Based on the record, including the parties' stipulations during the hearing, I conclude that the General Counsel has proven the allegations raised by Complaint paragraphs 7(a), 7(b), 7(c) and 7(d). Thus, without notifying or bargaining with the Union, Respondent eliminated the pension plan applicable to bargaining unit employees and substituted a "retirement and 401(k) plan."

The Board has long found that pension benefits constitute future wages and are within the meaning of Section 8(d)'s terms and conditions of employment, and are thus a mandatory subject of bargaining. *Paul Mueller Co.*, 335 NLRB 808 (2001), citing *Inland Steel Co.*, 77 NLRB 1, enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949).

Respondent's primary defense, that the Union no longer represented bargaining unit employees, must be rejected for reasons already discussed. In three prior cases, the Board rejected this argument. The record establishes no other justification for Respondent's unilateral action. Accordingly, I conclude that Respondent's replacement of the pension plan with a retirement and 401(k) plan violated Section 8(a)(5) and (1) of the Act.

The Separate 8(a)(1) Allegation

As discussed above, Respondent unlawfully discontinued its pension plan and, at the beginning of 2007, established a retirement and 401(k) plan, as alleged in Complaint paragraph 6. The Complaint separately alleges that Respondent, in communicating with its employees about the new plan, made a statement which independently violated Section 8(a)(1) of the Act.

Specifically, Complaint paragraph 8 alleges that on about November 13, 2006, Respondent announced to its employees, in writing, that its retirement and 401(k) savings plan excluded union employees, and that since this date, Respondent has maintained this exclusion of Union employees from its retirement and 401(k) savings plan. Respondent has admitted this allegation.

Respondent's defense is that management, in preparing the message to employees, should have used the word "unit" instead of "union" but mistakenly used the latter because the managers were not familiar with labor law and did not understand the difference. However, in evaluating whether a statement unlawfully interferes with, restrains or coerces employees in the exercise of Section 7 rights, in violation of Section 8(a)(1), the manager's intent is irrelevant. Frankly, so is the manager's knowledge or ignorance of the Act. All that matters is the effect which the statement reasonably would have on employees.

The Board has held that under most circumstances, an announcement of benefits restricted to nonunion employees is a per se violation of the Act. See *Hill Park Health Care Center*, 334 NLRB 328 (2001) *Libby–Owens–Ford Co.*, 285 NLRB 673 (1987); *Alaska Pulp Corp.*, 300 NLRB 232 (1990), enfd. mem. 972 F.2d 1341 (9th Cir. 1992). The present record

does not establish any unusual circumstance which would justify an exception to this principle.

It is true, of course, that in evaluating the coerciveness of a statement, the Board considers all the circumstances surrounding that statement. See. e.g., *Fleming Cos.,* 336 NLRB 192 (2001). In this case, however, those circumstances do not make the statement any less coercive than it ordinarily would be.

Respondent made the statement – that the retirement and 401(k) plan excluded *union* employees – after it had withdrawn recognition from the Union. Moreover, as the Board found in the previous cases, Respondent committed other unfair labor practices. For example, in *Goya Foods of Florida*, 347 NLRB No. 103 (August 30, 2006), the Board found that in addition to unlawfully withdrawing recognition from the Union, the Respondent had discharged employees because of their Union activities, in violation of Section 8(a)(3), and had made statements which interfered with, restrained and coerced employees in violation of Section 8(a)(1). These unfair labor practices included interrogating employees about their Union activities and informing employees that it would be futile for them to select a union or continue to support a union.

Nothing in the present record suggests that Respondent has remedied these unfair labor practices, which communicate to employees that Respondent bears hostility towards the Union and those who support it. In these circumstances, an employee who read Respondent's statement that its retirement and 401(k) plan excluded union employees, likely would not regard it as merely the result of an inadvertent error by managers who didn't know the difference between "union" and "unit." To the contrary, they reasonably would understand the statement to be yet another manifestation of Respondent's antiunion hostility.

Accordingly, I conclude that Respondent, by its conduct described in Complaint paragraph 8, violated Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and, at all times material, has been the exclusive collective–bargaining representative of the bargaining units described in Complaint paragraphs 5(a) and 5(b).

3. The Respondent violated Section 8(a)(1) of the Act by informing employees that its retirement and 401(k) plan excluded Union employees.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide information requested by the Union, as described in Complaint paragraph 6(a), that was relevant to and necessary for the Union to perform its function as exclusive representative of bargaining unit employees.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by eliminating its pension plan for bargaining unit employees and by replacing it with a retirement and 401(k) plan

without giving the Union prior notice that it contemplated such changes and without affording the Union an opportunity to bargain about them.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by changing, on two separate occasions, bargaining unit employees' health insurance coverage, without, on either occasion, providing the Union with prior notice of the contemplated changes and without affording the Union an opportunity to bargain about them.

7. The Respondent's actions described in paragraphs 3 through 8 above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The remedy provisions recommended below are in addition to, and not in lieu of, the remedies ordered by the Board in the prior cases involving this Respondent.

In addition to posting the Notice to Employees set forth below in Appendix B, Respondent must take the following actions. It must furnish the Union forthwith the relevant and necessary information described in Complaint paragraph 6(a). The Union requested this information on October 6, 2006, but the specific information, such as a seniority list of bargaining unit employees, may have changed since that date. Respondent must furnish to the Union both the information which was current on the date of the request together with any updates necessary to make the information current at present.

Respondent must, at the Union's request, restore to bargaining unit employees the health insurance coverage they enjoyed before Respondent's unlawful unilateral change in December 2003 or alternatively, at the Union's option and at the Union's request, Respondent must restore to bargaining unit employees the health insurance coverage they enjoyed before Respondent's unlawful unilateral change in January 2005. Respondent must also make bargaining unit employees whole, with interest, for any losses they suffered because Respondent made the unlawful unilateral changes in health insurance coverage.

Respondent must also restore the pension plan for bargaining unit employees which it unlawfully discontinued at the end of the 2006 calendar year. It must also make bargaining unit employees whole, with interest, for any losses they suffered because of its unlawful unilateral changes.

The General Counsel has sought a departure from the method the Board presently uses to compute interest. Specifically, the General Counsel argues that fully making the employees whole for the losses they suffered requires that Respondent be ordered to pay interest compounded quarterly.

In *Accurate Wire Harness*, 335 NLRB 1096, fn. 1 (2001), the Board considered and rejected the General Counsel's request for such a remedy. The Board, at any time, may well

decide to revise its formula for the computation of interest and, indeed, may choose to do so in the present case. However, until then, the Board's *Accurate Wire Harness* precedent controls. Therefore, I recommend that interest be calculated in the usual manner, as it was in *Goya Foods of Florida*, 347 NLRB No. 103 (August 30, 2006), in which the Board ordered Respondent to pay "interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the 'short term Federal rate, for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.' "

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended

ORDER

The Respondent, Goya Foods of Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Informing employees that Union members cannot participate in a benefit plan, including a retirement and 401(k) plan, made available to other employees.

(b) Failing and refusing to furnish, in timely manner, information requested by the Union which is relevant to and necessary for the Union to perform its duties as exclusive bargaining representative of bargaining unit employees.

(c) Making changes in bargaining unit employees' terms and conditions of employment, including their health insurance coverage and their pension plan, without giving the Union prior notice of such contemplated changes and affording the Union the opportunity to bargain about them.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self–organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Furnish to the Union, forthwith, the information which the Union requested on October 6, 2006, as described in Complaint paragraph 6(a), together what whatever updates are necessary tomake the information current.

(b) Restore to bargaining unit employees the pension plan which was in effect before Respondent discontinued it at the end of calendar year 2006.

(c) At the Union's request, restore to bargaining unit employees the health insurance coverage they enjoyed before Respondent unlawfully changed such coverage in December 2003 and again in January 2005. Should the Union make this request, it shall also have the option of deciding whether Respondent must restore the coverage in effect immediately before the January 2005 unilateral change or the coverage in effect immediately before the December 2003 unilateral change.

(d) Make bargaining unit employees whole for all losses they suffered because of Respondent's unlawful unilateral changes described above in subparagraphs 2(b) and 2(c). Such make whole remedy shall include interest calculated as described in the "Remedy" section of this decision.

(e) Within 14 days after service by the Region, post at its facilities in Miami, Florida, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 21, 2006.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. January 23, 2008

Keltner W. Locke
Administrative Law Judge

"Appendix A"

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by making certain unilateral changes in terms and conditions of employment without first notifying the Union and offering an opportunity to bargain, and by failing and refusing to provide the Union with certain requested, relevant, and necessary information.

Procedural History

This case began on November 13, 2003, when UNITE HERE, CLC, a labor organization, filed its initial charge in Case 12–CA–23524. For brevity, I will refer to UNITE HERE, CLC, as the "Union." The charge alleged that Respondent, Goya Foods of Florida, violated Section 8(a)(5) and (1) of the Act by announcing, about the second week in October 2003, that it would be changing insurance coverage, without bargaining with the Union. On January 23, 2004, the Union amended this charge by adding the allegation that, about December 1, 2003, Respondent changed its insurance coverage without bargaining with the Union.

The Union amended this charge again on October 31, 2006, to add the allegation that Respondent not only changed its employees' insurance coverage without bargaining on December 1, 2003, but did so again on a subsequent date, which the charge did not specify.

On November 20, 2006, the Union filed the initial charge in Case 12–CA–25198. It alleged that Respondent, on about November 13, 2006, violated Section 8(a)(5) and (1) by notifying employees that it would be implementing a 401(k) plan to replace its pension plan, without notifying the Union, and intending not to bargain with the Union. The Union amended this charge on February 15, 2007, adding the allegation that in or around January 2007, Respondent implemented a 401(k) plan to replace its pension plan, without bargaining with the Union.

On February 16, 2007, the Union filed a charge against Respondent in Case 12–CA–25286, and amended it on June 22, 2007. As amended, the charge alleged that in November 2006, Respondent announced, and thereafter made available to employees, a retirement plan which was restricted to non–union employees, in violation of Section 8(a)(1) of the Act.

On February 23, 2007, the Union filed another charge against Respondent. The charge, docketed as Case 12–CA–25305, alleged that since on or about October 6, 2006, Respondent had failed to provided requested information necessary for collective bargaining, in violation of Section 8(a)(5) and (1) of the Act.

On July 31, 2007, the Regional Director for Region 12 of the Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 12–CA–25198, 12–CA–25286 and 12–CA–25305. Respondent filed an Answer on August 13, 2007.

"Appendix A"

On August 30, 2007, the Regional Director issued an Order Further Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 12–CA–23524, 12–CA–25198, 12–CA–25286 and 12–CA–25305. For brevity, I will refer to this pleading simply as the "Complaint." The Regional Director amended it on October 2, 2007. Respondent filed timely Answers to the Complaint and the Amendment.

In issuing the Complaint, the Regional Director acted for, and with authority delegated by the Board's General Counsel, whom I will refer to as the "General Counsel" or the Government.

A hearing opened before me in Miami, Florida on November 5, 2007. Both the General Counsel and Respondent completed their presentations of evidence on that date and I recessed the hearing until December 3, 2007, to allow counsel the opportunity to receive and review the hearing transcript and exhibits and to prepare oral argument. On December 3, 2007, the hearing resumed by telephone conference call and counsel presented oral argument. Today, December 4, 2005, I am issuing this bench decision.

Background

Respondent argues, as an affirmative defense to the Section 8(a)(5) allegations, that it lawfully withdrew recognition from the Union. The Board considered and rejected this argument in a prior proceeding, and Respondent has appealed the Board's decision. To delineate which issues previously have been litigated, and which are, therefore, *res judicata*, it is helpful to review the Board's previous decisions.

In *Goya Foods of Florida*, 347 NLRB No. 103 (August 30, 2006), the Board made findings and reached conclusions binding in this proceeding. Those findings and conclusions include the following, which I adopt as *res judicata* in the present case:

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. UNITE HERE, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. On October 26, 1998, the Board certified the Union as the exclusive representative of an appropriate collective bargaining unit of Respondent's warehouse employees. That unit is the same warehouse unit which is described in the present Complaint as follows:

> All full–time and regular part–time drivers, forklift operators, production, maintenance and warehouse employees, employed by the Employer at its facility located at 1900 NW 92nd Avenue, Miami, Florida 33172; excluding all other employees, employees employed by outside agencies and other contractors, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

"Appendix A"

4. On December 4, 1998, the Board certified the Union as the exclusive representative of an appropriate collective–bargaining unit of Respondent's sales and merchandising employees. That unit is the same "sales representative and merchandising employee unit" described in the present Complaint as follows:

> All sales representatives and merchandising employees employed by the Employer at its facility located at 1900 NW 92nd Avenue, Miami, Florida 33172, excluding all office clericals, guards and supervisors as defined in the Act.

5. In December 1999, Respondent withdrew recognition from the Union as the exclusive representative of both the warehouse unit and the sales unit, in violation of Section 8(a)(5) and (1) of the Act.

Although Respondent has admitted that it withdrew recognition from the Union, it denies that it violated the Act. However, that issue is *res judicata* in this proceeding. Accordingly, I conclude that Respondent unlawfully withdrew recognition from the Union. Therefore, I further conclude that based upon Section 9(a) of the Act, the Union, since October 26, 1998 in the warehouse employees and drivers unit and since December 4, 1998 in the sales representative and merchandising employees unit, has been and remains the exclusive collective–bargaining representative of the employees in these units, as alleged in Complaint paragraph 5(d).

In *Goya Foods of Florida*, 350 NLRB No. 074 (August 23, 2007), the Board made further findings and reached further conclusions which, to some degree, are relevant here. The Board rejected Respondent's argument that it had lawfully withdrawn recognition from the Union as the exclusive representative of the bargaining units of sales employees and warehouse employees described in the present Complaint and in *Goya Foods of Florida*, 347 NLRB No. 103, above. The Board also rejected Respondent's argument that it lawfully could assign unit employees to routes and stores without notifying and bargaining with the Union because it had a past practice of doing so. Citing its earlier decision in *Goya Foods of Florida*, the Board found that Respondent was relying on "an asserted historic right to act unilaterally, as distinct from an established past practice of doing so.. . .[T]hat right to exercise sole discretion changed once the Union became the certified representative."

In *Goya Foods of Florida*, 351 NLRB No. 013 (September 28, 2007), the Board again rejected Respondent's argument that it had lawfully withdrawn recognition from the Union as the representative of the employees in the sales and warehouse units at issue here.

Admitted Allegations

In its Answer, Respondent admits a number of allegations. Based on those admissions I make the following findings. Respondent has admitted that the unfair labor practice charges were filed and served as alleged in Complaint paragraphs 1(a) through 1(h) and I so find.

"Appendix A"

Respondent also admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In keeping with this admission and the Board's conclusions in the earlier *Goya Foods* cases, I so find.

Additionally, based on Respondent's admissions, I find that the individuals named in Complaint paragraph 4 are Respondent's agents within the meaning of Section 2(13) of the Act, and that all but Carlos Unanue, President, Goya of Puerto Rico, are Respondent's supervisors within the meaning of Section 2(11) of the Act.

Respondent has admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent has admitted the allegations in Complaint paragraph 8 that on about November 13, 2006, it announced to its employees, in writing, that its Retirement & 401(k) Savings Plan excluded union employees, and since that date has maintained this exclusion of union employees from its Retirement & 401(k) Savings Plan. Based on this admission, I find that the General Counsel has proven the allegations in Complaint paragraph 8.

Respondent's Answer admits that in about the second week of October 2003, it notified its employees that it would be changing its group health insurance, as alleged in Complaint paragraph 9(a). I so find.

Contested Allegations

Changes in Group Health Insurance

Complaint paragraph 9(b) alleges that on about December 1, 2003, Respondent changed its group health insurance for employees in both collective–bargaining units. This paragraph further alleges that the changes included but were not limited to changes in providers, co–payments, coverage, out–of–pocket maximums, premiums, out–of–network coverage, prescription coverage and prescription co–payments. Complaint paragraph 9(c) alleges that Respondent made similar changes on January 1, 2005.

The parties have stipulated that until November 30, 2003, Respondent offered group health insurance to its bargaining unit employees through Blue Cross/Blue Shield, which I will refer to as "Blue Cross" and that it was an HMO (health maintenance organization) plan. They further stipulated that effective December 1, 2003, Respondent changed the group health insurance coverage from Blue Cross to Neighborhood Health Partnership, which I will refer to as "Neighborhood," and that it was an HMO plan. This plan remained in effect through December 31, 2004. I so find.

Additionally, the parties stipulated that effective January 1, 2005, Respondent changed the health insurance coverage from Neighbor to AvMed Health Plans, which I will call AvMed, and that this coverage continued in effect at the time of the stipulation. I so find.

"Appendix A"

Based on the parties' stipulations, I conclude that the General Counsel has proven the allegations set forth in Complaint paragraphs 9(b) and 9(c).

Complaint paragraph 9(e) alleges that Respondent made these changes without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct. The parties stipulated that Respondent made these changers in group health insurance providers without giving the Union notice and an opportunity to bargain. Accordingly, I conclude that the General Counsel has proven the allegations set forth in Complaint paragraph 9(e).

Complaint paragraph 9(d) alleges that the subjects described in Complaint paragraphs 9(a), 9(b) and 9(c) are mandatory subjects of bargaining, which Respondent denies. However, the Board has held that like wages, health insurance is a mandatory subject of bargaining. See *Wire Products Manufacturing Corp.*, 329 NLRB 155 (1999); and *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997). Further, like wages, it is considered an important term and condition of employment. *KSM Industries, Inc.*, 336 NLRB 133 (2001). Accordingly, I conclude that the General Counsel has proven the allegations set forth in paragraph 9(d).

In sum, Respondent has admitted that it made changes in health insurance without notifying and bargaining with the Union and I have concluded, based on Board precedent, that such changes involved mandatory subjects of collective bargaining. Although Respondent asserts that it lawfully withdrew recognition, the Board decided to the contrary in the earlier proceeding and that conclusion is binding in this proceeding.

Accordingly, Respondent's conduct violated the Act if the caused a material, substantial and significant change in terms and conditions of employment. Comparing the provisions of the Blue Cross, Neighborhood and Avmed health plans, Respondent argues that the change was not material, substantial and significant.

The terms of these three health plans are not identical, but Respondent argues, in effect, that on balance the terms are equivalent. For example, the Blue Cross plan required a covered individual to go to a primary care physician first before being referred to a specialist, but the Neighborhood plan allowed the person to go directly to the specialist.

An unlawful unilateral change can cause two kinds of harm. In all cases, such an unlawful change damages the union's ability to negotiate concerning the terms and conditions of employment of the employees it represents. This primary harm deprives employees of their voice in determining their working conditions.

An unlawful unilateral change also may cause secondary harm if it adversely affects unit employees' working conditions. This secondary harm certainly must be remedied. However, the absence of such secondary harm does not legitimize the unlawful change.

"Appendix A"

Suppose, for example, that an employer granted employees a $10 per hour wage increase without notifying the exclusive bargaining representative. That change does not adversely affect employees' paychecks but it does deny them the right to have their union represent them concerning a basic condition of employment, their pay. Thus, such a change is profoundly significant.

As the Board observed in *Crittenton Hospital*, 342 NLRB No. 67 (July 30, 2004), a change is measured by the extent to which it departs from the existing terms and conditions affecting employees." *Southern California Edison Co.*, 284 NLRB 1205 fn. 1 (1987), enfd. mem. 852 F.2d 572 (9th Cir. 1988).

As noted, Respondent argues that changing to an open access health insurance plan, one that did not require referral by a primary care physician, was "in itself, is a very high level benefit which offsets any increase in out–of–pocket expenses." That argument, however, makes an assumption about what unit employees would desire, and Respondent is not in a position to make such an assumption. Respondent's argument that changing to an open access plan was a "very high level benefit" effectively admits that this change was material, substantial, and significant. Accordingly, I conclude that it did constitute an unlawful unilateral change.

Respondent's contention that it was just continuing a well–established past practice essentially repeats the argument which the Board rejected in previous cases. Respondent cannot use what it did as a past practice before the Union became the exclusive bargaining representative to justify unilateral change afterwards. The argument, therefore, is no more persuasive than a husband telling his wife that before they married he dated a lot of people and was just continuing the past practice.

Additionally, I reject the argument that Respondent had no choice in the matter. It could have done several things besides switch health plans, provided that it bargained with the Union to agreement or impasse. In sum, I conclude that Respondent's unilateral change violated Section 8(a)(5) and (1) of the Act. Similarly, I conclude that Respondent violated the Act by its unilateral changes in pension and retirement benefits.

The complaint also alleges that Respondent failed and refused to provide the Union with relevant and necessary information. Stipulations establish that the Union requested and Respondent failed to provide certain information relevant to, and necessary for, the Union to perform its function. Respondent's defense rests on the argument that it lawfully withdrew recognition, which the Board has rejected. Accordingly, I conclude that Respondent violated Section a)(5) and (1).

In the certification of bench decision, I will address additional allegations in the complaint pertaining to the announcement described in complaint paragraph 8, that Union employees would be excluded from a retirement and 401(k) plan. Additionally, I will address in that certification the General Counsel's request that the remedy include compound interest.

"Appendix A"

When a transcript of this proceeding has been prepared, I will issue this certification, which will attach as an appendix the portion of the transcript reporting this bench decision. The certification also will include provisions relating to the findings of fact, conclusions of law, remedy, order, and notice. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, counsel had displayed the highest standards of civility and professionalism, which have been noted and appreciated. The hearing is closed.

"**APPENDIX B"**

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT inform our employees that Union members may not participate in an employee benefit plan, such as a retirement and 401(k) plan, in which other employees participate.

WE WILL NOT fail and refuse to provide information requested by the Union, UNITE HERE, CLC, which is relevant to and necessary for the Union to perform its duties as exclusive bargaining representative.

WE WILL NOT change the terms and conditions of employment for bargaining unit employees without providing the Union with prior notice of the proposed changes and giving the Union an opportunity to bargain concerning the changes.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish to the Union, forthwith, the information which the Union requested on October 6, 2006.

WE WILL restore to bargaining unit employees the pension plan which was in effect before Respondent discontinued it at the end of calendar year 2006.

WE WILL, at the Union's request, restore to bargaining unit employees the health insurance coverage they enjoyed before we unlawfully changed such coverage. Should the Union make such a request, the Union also may choose whether we restore to bargaining unit employees the health insurance coverage in effect before our unlawful change in December 2003, or the health insurance coverage in effect before our unlawful change in January 2005.

"APPENDIX B"

WE WILL make bargaining unit employees whole, with interest, for all losses they suffered because we unlawfully eliminated the pension plan and unlawfully changed their health insurance coverage.

GOYA FOODS OF FLORIDA
(EMPLOYER)

DATE: _____ **BY:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, Suite 530, Tampa, FL 33602–5824

(813) 228–2641, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228–2662.